No. 14702

In the
United States Court of Appeals
For the Ninth Circuit

FREDERICK I. RICHMAN,
Appellant,
vs.
LYDA TIDWELL, ROY E. HALLBERG, as Receiver of all the real and personal property constituting the former Richman Trust, and JOHN WHYTE, attorney for Receiver,
Appellees.

LYDA TIDWELL,
Appellant,
vs.
FREDERICK I. RICHMAN, ROY E. HALLBERG, as Receiver of all the real and personal property constituting the former Richman Trust, and JOHN WHYTE, attorney for Receiver,
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Opening Brief Appellant Frederick I. Richman

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JURISDICTION

The Trial Court acquired jurisdiction under 28 USC 1332 (a) (1) in that Appellant Lyda Tidwell as plaintiff alleged in her Complaint her residence as being the State of New Mexico and Defendant—Appellant Frederick I. Richman and the other Defendants' residences being the State of California. These allegations were not denied and were proved. Her Complaint sought termination of an *intervivos* private trust, the assets of which were of a value exceeding $1 million,

and the appointment of a Receiver. A receiver was appointed before judgment was entered upon the issue of undue influence. Thereafter Appellants Richman and Tidwell settled their differences. This appeal arises out of the Trial Court's judgment in the ancillary receivership proceeding settling the Receiver's account, fixing fees and distributing the moneys in the possession or under the control of the Receiver between the Appellants Richman and Tidwell. The jurisdiction of this Court rests upon Section 1291 of the Judicial Code as Amended (28 USC 1291).

PRELIMINARY STATEMENT OF CASE

On November 30, 1953, the Trial Judge directed the attorneys for the parties to appear at his Chambers and delivered to them his Memorandum Decision of that date. (R. 2). The decision determined that Appellant Frederick I. Richman who had for approximately twenty-five years practiced law in Los Angeles and had engaged in many business enterprises, was constructively guilty of unduly influencing his sister, Appellant Tidwell, at the time they executed the trust. The Trial Judge advised counsel he was forthwith appointing a Receiver. On December 2, 1953 Appellee, Roy E. Hallberg, qualified as the Receiver. On February 26, 1954, the Trial Court, pursuant to a Stipulation of the parties based upon their Settlement Agreement of the previous day, made an Order relieving the Receiver of his active duties, as of 5 p.m., February 28, 1954, except "money in the bank and under the control of the said receiver", and directed

the Receiver to account. (R. 56). On March 18, 1954, the Receiver filed his Report and Peteition for allowance of a reasonable fee (R. 75), and his attorney also petitioned for allowance of a fee of $3,000, plus an extraordinary fee. (R. 58). On April 6, 1954, Appellant Richman filed an Answer and Objections to these Petitions (R. 125). On April 7, 1954, Appellant Tidwell filed her objections to the Receiver's account and petition. (R. 145). On April 12, 1953, Appellant Tidwell (hereinafter referred to as Tidwell), filed a Reply (R. 152), to Appellant Richman's Objections. (R. 152). Appellants Richman's and Tidwell's issue involve the right of the Trial Court to adjudicate a dispute as to the interpretation of their Settlement Agreement of February 25, 1954, except to the extent that it may order moneys remaining in the possession of the Receiver after payment of expenses to be deposited with the Court when discharging the Receiver.

The Accounting and Petitions of the Receiver and his attorney, the Objections of the Appellants and the Reply of Tidwell constitute the pleadings and the manner in which the following general statement of the questions are raised. The questions involve the Trial Court's:

A. Determination of the amount of moneys in the possession of or under the control of the Receiver, and directing that specific amounts for certain specified items involved in the Settlement Agreement of February 25, 1954, be paid to the respective Appellants; and

B. Awarding fees in the amount of $6,000 to the Receiver and $1800 to his attorney.

Richman shall, since he charges a gross abuse of judicial discretion, attempt to concisely abstract this voluminous record, (the nature of the proceedings considered).

I.

STATEMENT RE: SETTLEMENT—ACCOUNTING —DISTRIBUTION OF FUNDS—RESULTING IN GROSS ABUSE OF JUDICIAL DISCRETION.

Appellants' settlement of their differences after the appointment of the Receiver, is evidenced by two letters dated February 19th and 25th, 1954, being Exhibit H (R. 807), appearing verbatim (R. 139-144). The plan of the settlement was an offer of Richman:

A. To buy or sell his interest in the Trust for $600,000; and

B. The Receiver to retain all money in the bank and under his control at the end of February to pay the Receiver's and Trust expenses subject to his accounting; the balance to be divided equally.

Tidwell elected to buy, by her letter acceptance. (R. 143). As required by the letter agreement, an escrow was opened, being Exhibit E, (R. 798). The Escrow Instructions (R. 800) provided):

"The following adjustments only are required in this Escrow".

Thereafter the printed form specifically provided:

> "Prorate taxes, including all items appearing on tax bill, except taxes on personal property not conveyed through this escrow to_____, based on latest tax statement in your possession."

Appellant Tidwell and her attorney signed these Instructions and there was inserted the word "None" in the blank space. Likewise the form stated:

> "Prorate rentals on basis of statements approved by me to _____, but make no adjustment on uncollected rentals."

There was inserted the word "None". The Seller's Instructions were signed by Appellant Richman and they contained the following words, which were inserted in a blank space:

> "Notwithstanding any of the printed provisions herein I, the undersigned, Frederick I. Richman, am not to be at any expense under this Escrow." (R. 800).

On February 26, 1954, the attorneys for the Appellants executed a written Stipulation received in evidence at pretrial as Exhibit C (R. 798), which appears verbatim at R. 54. Insofar as material to the facts here stated, it provided:

> "That the Receiver, Roy E. Hallberg, be relieved of the possession, control and management of the assets of the said Richman Trust, excepting funds in bank and under the control of said receiver as of 5:00 o'clock Sunday, February 28, 1954."

This stipulation was presented to the Court and it on February 26, 1954, made an Order, received in evidence

at the pretrial as Exhibit D (R. 798), which appears verbatim at R. 55. It provided that the Receiver:

> "Shall be relieved of his active duties of management, control and possession of the assets known as Richman Trust as of 5:00 o'clock p.m. Sunday, February 28, 1954, and that the said Receiver Roy E. Hallberg, his agents and employees and all other agents, servants and employees of the said Richman Trust give over control and possession to Lyda Tidwell, plaintiff, of all the assets of the said Richman Trust, excepting money in bank and under the control of the said Receiver but including all other said assets of the Richman Trust and the following apartment houses and their contents."

Thence the five Los Angeles apartment houses by name were specified. At a pretrial there was received in evidence Exhibit A (R. 796) a Mutual Release; Exhibit B (R. 797) a Dismissal, appearing verbatim in the record at R. 124, to which the Trial Court added, in ordering the Dismissal filed:

> "It is so ordered except that jurisdiction is retained over all moneys, credits and assets in possession or under control of Roy E. Hallberg, Receiver, heretofore appointed here and over said Receiver, and to fix his compensation and allow his expenses, including fee for his attorney. March 22, 1954—Ernest A. Tolin, Judge."

At the same pretrial hearing Exhibit F, a letter agreement with Air Pollution Control, Inc., dated October 22, 1953, which provided concerning payment for the installation of smog equipment:

> "A deposit of 10% of the above quoted amount is required upon execution of Contract, the balance of which is payable upon receipt of the Los Angeles County Air Pollution Control District Permit to Operate." (R. 802).

Such smog control units were installed in two of the apartment houses as shown by Exhibit G, the Permits to operate them (R. 805). The Permit for the apartment house at 418 South Normandy was issued March 9, 1954, and for the apartment house at 1746 North Cherokee Avenue, on June 2, 1954 (R. 805).

Other facts involved in the Order distributing funds pertain to:

Paragraph Four of the Settlement Agreement (R. 140) required the parties to stipulate to an Order and the Court did make an Order terminating the Receiver's active powers as of 5:00 p.m. Sunday, February 28th, "excepting money in bank and under the control of the said receiver . . . " The record shows the Receiver's performance concerning these moneys, as follows:

A. *A petty cash fund in the possession of the managers of the five apartment houses.*

The Receiver testified (R. 420), that the managers were his agents; that a petty cash fund in the amount of $785.00 was under his control.

> "Q. You did not take possession of that $785.00 — you left it with the managers, is that correct?

A. That is correct. For one reason. That reason being that that was a part of their working properties of the building.

Q. So far as you know, Mr. Hallberg, the Plaintiff, Lyda Tidwell, or her Agent, Mr. Udal, or someone of her agents, still have that $785.00, is that right?

A. So far as I know, Yes, they have what represents $785.00, either cash or receipts."

B. *Rentals Collected Before 5:00 P. M. on February 28, 1954.*

In addition, the Receiver failed to collect the rents for the three days February 26th, 27th, and 28th, 1954. He testified (R. 418):

"Q. Did your attorney also inform you that you were to only retain the money in the banks and under your control?

A. I believe he did. (R. 419)

Q. You have already testified concerning the $2,000 figure shown on page 12 of the Petition, that is, the receipts for the days of February 26, 27 and 28, 1954?

A. That was an approximate, it was an estimate, it isn't factual.

Q. Well, it was your best judgment when you verified the Petition?

A. That is correct.

Q. And based upon your acting as Receiver in this matter, have you made an audit since then to ascertain the amount or done anything?

A. No."

An investigation was made by Appellant Richman to ascertain the amount. He testified (R. 683), that the amount of rents collected on February 26, 27 and 28, was $1290.59. The managers of the apartment houses had this amount at 5:00 p. m. on February 28th and later paid it to Appellant Tidwell.

The April 12, 1954, Minutes of the Court (R. 157) state:

> "It is ordered that the issues of payment to receiver and his attorney is set for trial May 11, 1954, 9:30 a.m., and it is further ordered that issue of balance of remaining moneys by the Receiver after payment of his fees and his attorney's, is set for pretrial hearing May 14, 1954 10:00 a. m."

The trial fixing the fees was had from time to time on May 12, 13, 14, 17, June 7, 8, and 18, 1954. On June 18th the Court inquired (R. 774):

> "Can you go forward with the pretrial matter of the Tidwell v. Richman phase of this case on Monday afternoon?"
>
> "Mr. Camusi: Yes, that is wonderful. I was going to ask if I could be excused at 11:00. I have a matter I just can't put over.
>
> "The Court: We will continue this phase of this hearing until Monday afternoon."

A pretrial was had on June 21, 1954 (R. 782-817), at which time Appellant Richman introduced in evidence Exhibits A, B, C, D, E, F, G, and H, heretofore stated. It was stipulated (R. 809) that Appellant Richman's fees as agent for the Trust for the month of November,

1953, in the amount of $3,104.13 had not been paid. The Court then stated (R. 809), that it appeared issues of fact remain which would require trial unless the parties could stipulate. Appellant Richman offered to forfeit a smog equipment item of $58.80 rather than go to trial, leaving only a then believed issue of proration of rents (R. 810). Thereupon argument in support of Appellant Richman's objection to the receiving of parol testimony concerning prorations to vary the terms of the written Settlement Agreement and Escrow Instructions was made. The Court ruled:

> "The Court: The Court sustains your objection. I think parol evidence takes care of it, the parol evidence rule, I mean." (R. 812)

Thence the Court set aside the ruling (R. 813), and the pretrial was adjourned.

The next proceeding occurred September 27, 1954, which the Court opened by stating (R. 817):

> "It has been a long time since we were all here in this case, but, as I recall it, this is the day for the final, final argument on the subject of settlement of the Trustee's account or, rather, the Receiver's account."

Again Appellant Richman's objection to the receipt of evidence upon the question of proration upon the ground that such evidence would vary the terms of the written Settlement Agreement, were made (R. 819-828), with the closing statement:

> "That is the only means by which I say we can avoid an expensive trial."

Thence Appellant Tidwell's argument in support of evidence upon her claims for escrow expenses and as to proration it was asserted (R. 835-837):

"As to the proration of the rents, I think these managers' reports for the five apartment houses will show when the rent was due, and when it was paid, so that in that sense it can be seen that during the month of February certain rents were collected which were properly for the month of March. And I would like to offer those into evidence, together with these utility bills.

"I noticed in the transcript that Mr. Enright said we might introduce the utility bills into evidence, and I offer those exhibits at this time.

"Mr. Enright: To which objection is made upon the grounds heretofore argued, and heretofore stated, and if such documents are received in evidence, of necessity there will be created an issue as follows:

"Concerning the real-property taxes, which are claimed to be some $4,000.00, if proration is to occur, of necessity there will have to be proration of the personal-property tax claims paid by Mr. Richman on personal property on a much larger sum.

"Second, as to the rents received by the managers before March 1st, which under the court order were to go to the Receiver, and which in fact were picked up by Mr. James Udall, there is no dispute in the evidence concerning those, in the amount of $1,290.59, it can be prorated, and then, of necessity, you must look into the rents, the delinquent rents, that were collected in March, because if we are going to prorate, we will have to

prorate both ways to be equitable and fair.

"Thirdly, if we are to prorate utility bills, these bills here, this bundle of bills show errors in mathematics.

"Fourthly, it shows right upon its face that they are attempting to charge Mr. Richman with long-distance phone calls, and similar charges.

"Also, I submit that the tenants pay when they get their bill for their month's rent, and they would have paid in March.

"And there are a lot of details of questions of fact, and if we are going to entertain some implied covenant to prorate, or some implied custom to prorate, when we have this express contract, I submit that if we try the matter we will take at least a number of days to hear it

"The Court: Sustained. Just a moment

(Another case called.)

"The Court: Proceed.

"Mr. Camusi: I don't know what that ruling means. If it means your Honor does not care to taket evidence at this time, and you are to decide an accounting should be had, that is perfectly agreeable to us, but I hope it does not mean your Honor has ruled before I shall have made my argument as to what the law is on this issue in the case.

"The Court: If on the main contention I should ultimately decide you are right, we will refer the whole question to a Master for the taking of evidence.

"Mr. Camusi: I see.

"The Court: But I think at this time that you are bound by the agreement.

"Mr. Camusi: Oh, that is my point, your Honor."

The approximate amount of taxes for the period January 1st to February 28th, were ascertained during the June 21st pretrial, no utility bills were marked for identification and no evidence was received to support these claims. The Court, upon this state of the pretrial record stated: (R. 842)

> "I will take it under submission and give you a decision rather quickly."

On October 5, 1954, the Court issued a Memorandum to Counsel re disposition of funds under control of Court and allowance of fees (R. 182-188). Appellant Richman's claim for his fees as agent of the terminated Trust, in the amount of $3,104.33, being a certain 10% fee as fixed by the Trust Agreement, was reduced to 6%. Concerning escrow expenses the Court stated (R. 183):

> "Plaintiff has stipulated in the Escrow Instructions that all of the seller's costs and expenses of escrow, revenue stamps and recording be at her expense. She cannot now avoid that written understanding by claiming inferences from an agreement that do not clearly flow from that written agreement."

At (R. 186) concerning the same Escrow Instructions which provided no proration the Court stated:

> "The Court finds that real property taxes were an operating obligation of the Trust, whereas Mrs. Tidwell was to assume and did assume the operating expenses of the Trust after a tax item in the sum of $4,952.77 had accrued even though the bill-

ing date had not arrived, it is proper that she be reimbursed for what she has paid out of her own funds in payment of operating expenses which had arisen before she acquired her fee simple title and assumed by express agreement the operating expenses as of a date after the same period in question."

Likewise (R. 184) the Court directed the utility bills in the amount of $1877.50 (there being no evidence to support the amount even at pretrial), to be paid out of the funds in the possession of the receiver; determined that cash in the hands of the Managers, Receiver's Agents, representing the rents for February 26, 27 and 28, were a part of the assets being purchased by Appellant Tidwell; determined (R. 185) that smog units contracted for before the Receivership partially or entirely installed during the receivership, on which payment was to be made upon issuance of Permit, were to be paid out of the funds. Likewise, the $785.00 cash fund (R. 185) in the possession of the managers, being agents of the receiver, were assets of the Trust to be retained by Appellant Tidwell. The facts as to the fees ordered paid will be considered hereafter. On November 19, 1954, the Court signed its Order (R. 190) carrying its decision into effect. Appellant Richman has appealed from this Order. (R. 196)

II.

TRIAL COURT'S JURISDICTION RE APPELLANTS' SETTLEMENT AFTER RECEIVERSHIP.

Appellant Richman in his Answer and Objections to the Account of the Receiver and Petitions for Fees,

pleaded (R. 137) that the Receiver by virtue of the Court Order of February 26, 1954, was required to account to 5:00 o'clock P. M. February 28, 1954. The moneys remaining in the possession of the Receiver were subject to the directions of the Appellants -

> ". . . and, in the event they (Appellants) cannot agree upon their distribution then each is entitled to apply to a court of competent jurisdiction to initially and originally determine their respective rights." (R. 138)

Appellant Tidwell filed a Memorandum with the Court contending that the Trial Court had the power to dispose of the remainder of the funds under the control of the Receiver. (R. 154). On April 12, 1954, the Trial Court, when setting the hearing upon the accounting also set the question of distribution of the funds for pretrial for another date. At that time (R. 245), for Richman it was again stated:

> "Your Honor, I again point out that this Court does not have jurisdiction of a Contract made by Lyda Tidwell and Frederick Richman on February 25th, 1953.
>
> "Mr. Camusi: Let's argue that at the pretrial.
>
> "The Court: That would appear *prima facia* to be so."

During the trial upon the Receiver's accounting Appellant Richman again pointed out that the Trial Court had power, at most, to charge the fund in the hands of the Receiver because he failed to retain control or possession of the petty cash fund of $785.00 and

the rents for February 26th to 5:00 o'clock P. M. February 28, 1954, in the amount of $1290.59, which were admittedly obtained and were in the possession of the Appellant Tidwell, and further find that the Receiver had on February 27, 1954, made a payment for the benefit of Appellant Tidwell in the amount of $2027.25 contrary to the Court's Order of February 26, 1954. (R. 685-686).

III.

STATEMENT RE FEES—CONDUCT RESULTING IN GROSS ABUSE OF JUDICIAL DISCRETION.

A. Representations—Receiver's Ability, Experience Availability.

On November 30, 1953, the Trial Judge rendered its decision upon the merits in the main action on the issue of fraud or undue influence in the inception of the *intervivos* trust. (R. 220). It determined the Trust should be terminated because of statutory undue influence. The attorneys for the parties were called to the Court's Chambers, the decision delivered and the Court announced its intention to appoint Roy E. Hallberg Receiver. It stated:

> "Mr. Hallberg was for some years associated with a property management operation in Chicago, and has considerable acquaintance and experience in that type of work. Since coming to California he has held various positions with different types of corporations and has been engaged in the management of property for elderly relatives who have considerable apartment property in Southern California.

"I called him and found that he is available, and I asked him to come in here at about 2:00 o'clock today so that counsel could meet him." (R. 205)

The Court continued:

"I have known Mr. Hallberg in a rather off-hand way for some time, but he is not a particular friend or even a close acquaintance, although his name has come up in connection with the consideration of other names." (R. 206)

Mr. Hallberg was called to the Chambers of the Court, and the Court stated:

"The Court: Just have a chair, Mr. Hallberg. The court has now given its decision in the matter, which I discussed with you last week, and I have asked counsel if there is any objection—of course, the defendant feels no doubt that he should have won the case, but since a receiver is to be appointed —whether they have any objection to you as the selection of the court as receiver.

"Now, they haven't announced any objection, but they don't know you. I have explained to them that you have had experience in this type of work in Chicago, that your main vocation for some years was in the management of real properties, sometimes in connection with court receiverships, and that your experience in it locally has been in the management of your own real properties, which were of income nature, and of similar properties owned by either you or your wife's relatives.

"Mr. Hallberg: That is correct.

"The Court: Now, if counsel wish to question Mr. Hallberg before the appointment is actually made, the clerk will swear him, and you may ask any questions you wish.

"Mr. Enright: On behalf of the defendant, your Honor, I am in no position at this time to interrogate this gentleman. I am satisfied that your Honor would not have selected anyone except a man of not only integrity, but of ability. But my objection goes to the proposition of the appointment, your Honor, and I will seek, and now seek time to consider what steps are required under the procedural requirements of this court to bond against his appointment at this very day, or as soon as I assume the order can be drawn. You see, your Honor, my basic position is that I do represent a member of the bar, and I do represent a person who, I submit, under all the evidence has never taken one red cent from this trust, from the date of its execution and for years before in the operation of this joint venture." (R. 209-211).

The Court stated:

"The Court: I think it is not appropriate for the defendant to remain longer in control as trustee, for several reasons which do not reflect upon whether or not he has been taking money from the trust. I don't understand that there is any charge that he has ever stolen anything. Of course, there is an action for an accounting based upon various grounds, which we need not enumerate here, which include, among other things, that he has allowed, I think, excess fees to himself. Is that not it?" (R. 212)

Concerning the proposed Receiver's place of business it was stated by the Court:

> "I am going to suggest to Mr. Hallberg, who I think has a place of business somewhere around San Gabriel or San Marino, or South Pasadena,—
>
> "Mr. Hallberg. It is in Pasadena.
>
> "The Court: And you live at Corona del Mar?
>
> "Mr. Hallberg: That is correct." (R. 215)

Richman's objections to the Receiver's Account and Petition (R. 125), and a Petition to Disqualify the Trial Judge (R. 158), raised an issue as to the experience and availability of the Receiver and the unclean hands of the Receiver, arising out of these representations. On December 1, 1953, Richman requested that the amount of supersedeas bond to stay appointment of the receiver be fixed (R. 216). The Court was advised that the Receiver had, without qualifying, taken over a bank account and was demanding and collecting rents collected by the managers be turned over to him, and the Trial Judge stated to Richman's counsel:

> "The Court: Mr. Wyatt, I think perhaps the concern isn't quite as imminent as you have been led to believe. The receiver hasn't brought up the bond." (R. 216).

and:

> "The Court: The bond will have to be approved by the court and he isn't entitled to take over any estate, under the rules, that are in this district, until he has posted a bond and taken the oath." (R. 218).

The Minutes for December 2, 1953, (R. 30), show that the bond was presented and approved on that date. Richman's Motion to fix supersedeas bond was on the same day continued until December 3rd. On December 4, 1953, the Court's Minutes show that it refused to fix supersedeas bond. (R. 32). The Receiver's attorney's testimony disclosed the following concerning the Receiver obtaining his bond:

> "Q. (By Mr. Enright): Please read your time slip of December 2 about getting qualified. (346)
>
> "A. I will be glad to. The time slip for December 2—this is Mr. Fitzpatrick's time slip—'Hallberg came in at 9:00 a.m. re his bond as Receiver. I telephoned Hecht at F & D. He said that he had been asked last night by Richman to put up a supersedeas bond on appeal. That if a writ of supersedeas were issued we might not be able to collect the premium on our bonds out of the assets of the receivership.
>
> 'He therefore wanted to wait until the issuance of the bond, to see if a supersedeas were issued. I reported this to Mr. Hallberg. We agreed to wait one hour.
>
> 'After a while Hallberg suggested that he talk to Judge Tolin's secretary. He called her, but got Judge Tolin, who said to get the bond in right away and he would see that the premium was paid out of the receivership assets.
>
> 'I phoned Hecht and told him that if he weren't able to issue the bond we would get it elsewhere. He then asked if it was O. K. for him to telephone Judge Tolin and I said yes.

'He called back in a few minutes and said he would issue the bond. I gave him the title of the court and cause, and Hallberg went over to his office to get the bond. Whyte came in and I reported to him what had happened.' " (R. 555-556).

On January 15th, a Petition of the Receiver for authority to expend moneys in renovating, etc., the apartment houses, came on for hearing, and for Richman it was stated (R. 231):

"One of our problems is that we have no knowledge of Mr. Hallberg's experience in the particular field, other than what your Honor told us the day he was appointed. We would appreciate Mr. Hallberg going over his problems, if he will, to some degree with Mr. Richman from time to time, if that meets with the approval of the parties, because that is the only means we can have.

"May I say, second-guessing Mr. Hallberg's judgment in shifting sinks in the Western Arms Apartments, which our answer shows is rapidly becoming a changed district, . . . (R. 231).

The Court had explained the then cooperative circumstances in the following words:

"I understand, by being cooperative with the Receiver, nothing has been waived, and I appreciate the fact Mr. Hallberg, on occasions when he has seen me, has told me of very nice cooperation that Mr. Richman has given him in regard to matters where they have had occasion to work together, saying that even on some occasions Mr. Richman has gone beyond the mere request which

> the Receiver had made for information and had given positive cooperation on a voluntary, very useful basis." (R. 221)

The Court's Memorandum Decision of October 5, 1954, stated (R. 187):

> "Mr. Richman, with whom he had to deal, is a person given to hostile and aggressive attitudes. It is evident that he exercised these in his relations with the Receiver."

Richman could not contact the Receiver after December 18, 1953. (R. 537-538).

B. Petition To Disqualify.

The Settlement Agreement of the Appellants, their Stipulation relieving the Receiver from active duties except his retaining the money in the bank and under his control, occurred in February, and by April 12th, issues had been joined by the Accounting, Petitions for Fees, and Objections. The Minutes of April 12th, (R. 157), record the following:

> "The Court makes a statement that no evidence will be taken concerning the appointment of the Receiver in this action"

and the accounting was set for hearing on May 11th, 1954. On April 30, 1954, Appellant Richman filed a Petition with the Court requesting that the Trial Judge disqualify himself from hearing the Accounting and Petition for Fees, upon the ground the Trial Judge was a necessary witness to the misrepresentations of the Receiver as to his experience, qualifications and availa-

bility; (R. 158); that the Trial Judge would be required to testify concerning these allegations. The Trial Judge did not act upon the Petition. The issue of the Receiver's unclean hands, arising outs of his misrepresentations, resulted in the Court ruling and stating:

> "You can't call the Court on that subject. We are not going into it any further. It is closed." (R. 456).

Under these circumstances Appellant developed the facts involved in the issue of the representations made by the Receiver. (R. 417-461).

C. Receiver's Availability and Earnings.

Concerning Receiver Hallberg's availability to act as Receiver and manage the five apartment houses, being the principal assets of the Trust, the record reveals the following: Before December 1, 1953, he had taken an examination to be an employee of the County of Orange (R. 326). He was advised on Wednesday, December 2nd, or Thursday, December 3rd, 1953, that he would commence work on December 7, 1953 (R. 357), as a permanent employee (R. 356), at a salary of $355.00 a month (R. 328). The record is replete (R. 326-342 and 871-922 (Deposition of Hallberg)), with the effort to ascertain Mr. Hallberg's County of Orange hours of employment, previous experience, and previous compensation as bearing upon a reasonable fee for this receivership. The Court's questions (R. 338), developed that the Receiver was, during the receivership commencing December 7, 1953, working an average of eight

hours a day on a five-day week for the County of Orange. The Receiver (R. 361) did not advise the County of Orange he was appointed a Receiver by the Federal Court. He stated he had some other commitments. He did not advise the Trial Judge (R. 363) of his contemplated County of Orange employment when he took his oath on Wednesday, December 2nd. He told no one he was going to be employed by the County of Orange because he intended to delegate his receivership duties to his "Secretary", Miss Cosgrove, the maiden name of his wife (R. 380). He introduced Miss Cosgrove by the name "Miss Cosgrove" to Edna Lipphardt, manager of one of the apartment houses as his "right hand", stating that Miss Cosgrove would supervise the building. (R. 504). Another manager, Maude Kennedy, saw the Receiver on three different occasions during the receivership. (R. 469, 476, 477). Miss Cosgrove testified (R. 526) that she phoned the Receiver at the Orange County Assessor's office when a problem arose concerning the breakdown of the refrigeration in one of the apartment houses.

> "Q. Had you ever told Mr. Harrison (a bookkeeper of the Receiver), or anyone else that they could reach Mr. Hallberg in Mr. Byram's office (County of Orange)?
>
> "A. I had not.
>
> "Q. So far as you know no one knew that Mr. Hallberg could be reached at Byram's office, the County Assessor's Office, excepting yourself, is that right?

"A. That I am not sure of; possible."

Witness Barney Manalis (later referred to again) testified (R. 702), that he tried to contact the Receiver quite a few times but never successfully. Richman testified that he was never able to contact the Receiver. (R. 719). On December 18, 1953, the Receiver was absent from the County of Los Angeles and his attorney verified a Petition for an Order authorizing payment of Christmas bonuses to the managers of the five apartment houses and other employees. (R. 34). The Receiver testified that during the period September 5th to October, 1953, he was employed by Narmco Corp., a fishing pole manufacturer, at a salary of $350 a month. (R. 364). That from May to December, 1951, after he had made an investiment of $18,000 in Morgan Construction Company, a corporation, he had a weekly drawing account of $100.00. (R. 365). That he came to California in 1947, for the Refrigeration Corporation, but it "got into financial trouble" and then he had trouble with his back, "so my employment record is a little confusing from that point on, . . ." (R. 875). On May 29, 1947, he purchased a lot at 85 Glen Summer Road and built a house on it, then another lot at 90 Glen Summer Road and a house on it; he sold the last house on June 17, 1952 (R. 367). He lived there until about 1952. The Trial Judge lived on the same block on Glen Summer Road at the same time. (R. 430). He testified that from 1932 to 1947 he was employed by Garrett Company in New York as a wine salesman and that he had earned as much as

$40,000 a year (R. 368). He quit this employment to come to California. During the period December, 1949, to November, 1950, he owned a 16 unit apartment house at 1509 Fair Oaks, Pasadena. The only experience he had with properties in Los Angeles County was the Glen Summer Road houses, a four-unit flat, one furnished, at 507 El Molino Street, Pasadena, and the 16-unit apartment house. (R. 370). The only business address he had was Morgan Construction Tooth Company (May to December, 1951), except that he explained his answer to the Trial Court on November 30, 1953, concerning a business address in Pasadena, that he received mail at the flat. This flat was rented at the time (R. 377). That before being employed by Garrett Company in 1932 he had been employed for about one year by a bondholder of certain bonds secured by Chicago income property, issued by a Chicago bank; one Chicago hotel was similar to the Richman apartments. (R. 381). Mrs. Hallberg explained her experience (R. 515-527), that she had graduated from the University of Minnesota; that in approximately 1939 she attended evening classes two or three times a week at the Traphagen School of Design in New York City when she was employed by Investment Counselors Johnston & Longquist; she met and married Mr. Hallberg in 1940, decorated their New York home, decorated Glen Summer Road residences and was a housewife until the receivership.

The Receiver, Hallberg, testified:

"Q. Now, Mr. Hallberg, when you were appointed Receiver and within the two or three days

after your appointment, and I assume December 2nd as your date of appointment,—we had better go back to December 1st—that was the day, I think you went around to some of the apartment houses. During the first three days, did you introduce anyone to the managers as being your agent?

"A. Yes.

"Q. What did you tell the managers?

"A. I introduced Miss Cosgrove.

"Q. What did you tell the managers?

"A. I told them she was going to act for me.

"Q. In the—

"A. In the management, yes. And anything she wanted (206) would be under my instructions, and they were to follow it.

"Q. You did not later inform the managers that Miss Cosgrove was your wife, did you?

"A. I didn't see it was necessary, for the simple reason that she preferred acting as Miss Cosgrove.

"Q. You did not inform Judge Tolin you intended to delegate your operation of these five apartment houses to your wife, did you?

"A. I did not inform him that I was going to hire any assistance, or, in fact, we had no conversation about the assistance I was going to require.

"Q. You did intend to do this very thing when you were appointed Receiver, didn't you?

"A. If it required it.

"Q. You did, in fact, perform your activities as the Receiver by receiving reports from Miss Cosgrove?

"Mr. Whyte: Oh, objected to as going far beyond the evidence adduced here. The witness has testified as to what he did. His own personal activities, as to a Receiver, went far beyond receiving reports from Miss Cosgrove or Mrs. Hallberg. It assumes facts completely contrary to the facts.

"The Court: Overruled.

"Q. (By Mr. Enright): You did, in fact, Mr. Hallberg, especially—or, commencing December 7, 1953, rely upon Miss (207) Cosgrove in performing activities involved in the management of these five apartment houses?

"A. I didn't hear everything you said there.

"Mr. Enright: Read the question.

(The question was read.)

"The Witness: I relied on some of her activity, that is true.

"Q. (By Mr. Enright): Actually, the physical method of operation was that commencing December 7th and all through February 28th, and you would make trips up to Los Angeles on the weekends or come up Friday night after completing your work for the County of Orange, isn't that right?

"A. I came up during the week. I came up Friday, it is true. I was there Saturday. I was even there on Sunday." (R. 433-434).

The Receiver's direct testimony more clearly describes how he performed his duties in managing five apartment houses of over 400 units, being substantially all the assets of the Richman trust.

D. Receiver's Services.

The Receiver testified, in giving his deposition, that he would come from Orange County where he lived and was employed to Los Angeles on weekends, Saturdays and Sundays, and some evenings to render his services as Receiver. (R. 445-446). At trial he explained that he came to Los Angeles during some week days.

At the Court's suggestion the Receiver occupied one of the apartments in one of the apartment houses. He employed a Mr. Harrison from Monday through Friday to keep the books and left instructions for Mr. Harrison in writing on occasions. (R. 446). A diary, Exhibit "B" (R. 393-404) was kept by the Receiver and he testified concerning the entries:

"Those entries were made in the evening after we both returned home. It was a composite of the work, for the most part, that was accomplished during a particular day." (R. 389-390).

Miss Cosgrove made the trips to Los Angeles, collected the rents from the manager and deposited them

in the bank. He explained (R. 264-265) that she handled the:

> "decorating, purchasing of material, and overseeing the operations of the actual refurnishing of some of the apartments . . . she represented me in a good many of our contracts with service people, with the managers, with the various tradespeople we had to deal with . . . She performed various duties. Among them was overseeing the decorating of a lot of these apartments. She made periodic trips every other day, practically, to the various apartments and picked up the monies that were on hand and collected by the managers." (R. 268)

The Receiver's rendition of services other than delegating to Miss Cosgrove is best ascertained by reference to the record.

On December 1, before he qualified as Receiver he and his attorney, who had yet to be appointed by the Court as Attorney for the Receiver, took over the Trust's bank account at the Union bank and called at the apartment houses and took possession of rent monies. (R. 552). On February 25, 1954 he had a conversation with his attorney regarding a conference he was to have the following day with the Court concerning appellants having settled their law suit. (R. 417). He testified that on the evening of February 26, he had a conversation with his attorney:

> "Q. And at that time you were advised by your attorney that the Court had made the order

of February 26, 1954, relieving you of your active duties of management?

"A. That is correct.

"Q. Of the five apartments, or the Trust assets?

"A. Yes.

"Q. Did your attorney also inform you that you were to only retain the monies in the banks and under your control?

"A. I believe he did." (R. 418)

The stipulation of the parties and the Court's Order directed him to collect rents and retain money in bank and under his control until 5:00 o'clock P. M. on February 28th. He failed to collect the petty cash fund in the amount of $785.00 in the possession of the managers. (R. 419). He estimated, when accounting, that rents in the amount of $2000.00 were collected by the managers on February 26, 27 and 28 (other evidence established the amount as being $1,290.59), and he did nothing about it. (R. 419). The Court's decision of October 5, 1954, explains that the Receiver even after the February 26th order did on February 27, 1954, assume that he would remain in possession and was justified in believing that he should make payment due March 1, 1954, upon a trust deed installment secured by one of the apartment houses. At R. 423, the Receiver's testimony reveals that he had made the payment on February 27th, after being informed by his attorney on the 26th of order made on that day, al-

though the January 1st payment was made on January 18th (R. 630) and the February 1st payment on February 9th. (R. 631).

On Sunday, March 7, 1954, the attorney for the Receiver testified that he was at the Receiver's home at Corona Del Mar after a golf game. After dinner the Receiver Mr. Hallberg and Mrs. Hallberg (Miss Cosgrove) discussed the problem they had concerning creditors' bills or statements that were not received until after March 1st.

> "Mr. Hallberg telephoned Judge Tolin in my presence and put the problem to him. I then came on the 'phone. . . I explained that I had contacted the attorneys for the plaintiff and defendant and Mr. Enright objected to the Receiver paying those bills and that Mr. Camusi was agreeable that they should be paid by the Receiver. Judge Tolin then and there instructed me to pay those bills, that is, that the Receiver should pay those bills and those payments are evidenced by the schedule attached to the Receiver's Report here." (R. 545).

E. Accounting Services and Experiences.

The Receiver testified concerning these services in support of his fees that he had set up a new bookkeeping system. He testified in his deposition that he, when in college at Chicago, did part-time accounting while in school (R. 911). At the trial he testified that he had two years accounting experience in Chicago (R. 737); he left there to go to work for Garrett Co. about 1932.

During the week of December 1, 1953, he took over Mr. Richman's five apartment managers as his employees and also employed Mr. Richman's secretary-bookkeeper, a Mr. Harrison. (R. 537). Mr. Harrison had kept the Richman Trust books during the period May, 1952, until December, 1953, for Mr. Richman. The Court rules required the Receiver to file an accounting within 60 days, or about February 2nd, 1954. The attorney for the Receiver filed an Affidavit in support of an Order extending this time (R. 45), stating that the attorney was not available to counsel with the Receiver and his bookkeeper Mr. Harrison during the week January 24th. The Court made an Order extending the requirements of the local Rule 18(b) for a 60 day accounting to March 20th, 1954. Bookkeeper Harrison was discharged at about the same time as this Court Order and Affidavit. The discharge occurred at the time the bookkeeper was interviewed by Mr. Richman concerning the Air Pollution criminal citation hereafter set forth. Thence the Receiver employed a bookkeeper named Findeisen. The Receiver never called either bookkeeper to explain why it was that the books were as incomplete as shown by the testimony of Richman (R. 689-700). The nature of the accounting as shown (R. 104-121), reveals the bookkeeping problems, if any, in the keeping of records of receipts and disbursements for the five apartment houses. The amount of money, if any, that should be allowed the Receiver for his college part-time or Chicago 1931 bookkeeping experience is in dispute.

F. Refrigeration Break-Down.

Maude Kennedy, the manager of the Western Arms Apartment House, testified that the equipment furnishing refrigeration to the apartments failed February 16, 1954, and she tried on the 17th, 18th, and 19th to contact Mr. Hallberg. On the evening of the 19th Miss Cosgrove called and asked if she was attempting to get in touch with Mr. Hallberg. That by the morning of the 19th, 21 of the apartments were without refrigeration. The Receiver's diary (R. 403-A) contains a note under the date of the 19th.

"To W. A. re refrigeration John Dougherty."

The Receiver explained (R. 441) that Mrs. Hallberg did not report to him on the 16th, 17th, or 18th, this refrigeration failure, and stated:

> "At this time, no, because the refrigeration service company would have automatically been called."

He could not recall this failure being reported to him and stated:

> "I do not believe it had been reported. However, I cannot recall exactly because there is no mention in my diary here."

In response to the Court's questions concerning the Receiver being able to:

> "recall how much time you gave Orange County during the two days that elapsed, from the time

the emergency arose and the time you arrived there."

"It is pretty hard at this time to state. I do know I went in there and as far as the actual work on the unit was concerned, the men were more capable than I was of doing the required amount of repair; my being there wouldn't have helped any." R. 436-437).

Miss Cosgrove testified she phoned Mr. Hallberg at the Orange County office; she had not told anyone he could be reached there. (R. 526)

G. Air Pollution—Criminal Citation.

Appellant Richman delivered to the Receiver the letters and file pertaining to Exhibit F. (R. 801-803), the contract for the installation of an air pollution control unit about December 5, 1953. (R. 636). Barney Manalis, an agent of the contractor with whom the contract was made to install the unit testified that after attempting to contact the Receiver, Hallberg, several times in December, without success, was advised by Roy Harrison (the Receiver's bookkeeper):

"He advised us at that time that as the Federal Receiver for the apartment house he was not bound to the contract and to hold up and do nothing." (R. 702)

The timesheet of the attorney for the Receiver and testimony show (R. 556), that on December 27th, he spent .3 of an hour in the

"Examination of files with reference to installation of incinerator equipment for Canterbury and Oliver Cromwell and liability of Receiver to carry out contracts for such installation."

He testified he advised the Receiver that contracts were valid and binding and that they should be carried out, and that the balance of the 90% purchase price was not to be paid until after the installation had been performed and permit issued by the Air Pollution Control District. (R. 557). On January 13, 1954, Exhibit 4 (R. 711), a Citation for violation of Air Pollution Control District—Los Angeles County, was issued. Witness Manalis testified that about a week before January 22, 1954, he received a call from Mr. Harrison who advised a Citation had been issued and to proceed with the work. Manalis advised Harrison that they could not proceed with the work until the blueprints that the Pollution District had approved had been returned to him. Miss Cosgrove testified that she heard Mr. Hallberg tell Mr. Harrison about January 13th, to attend to the Citation issued by the Smog Control District. (R. 519). The receiver admitted that he saw a Memorandum dated December 22nd, reporting that installation of the smog units were in suspension. (R. 744). The drawings were transmitted by Mr. Richman to Mr. Hallberg on December 7th. (R. 648). On January 22nd, Hallberg came to the office of the Receivership at the Oliver Cromwell Apartment House and went through his briefcase and found the drawings. (R. 642). On January 22nd the Receiver dictated and caused to be transmitted the January 22, 1954 letter requesting

Manalis to proceed to install the units. (R. 646). At (R. 753) the Receiver explained that after January 13 he requested Harrison to deliver the blue prints right away. A criminal complaint was filed with the Los Angeles Municipal Court and Citation issued for the manager of one of the apartment houses and Mr. Richman. Miss Cosgrove had done nothing concerning the Citation and when the criminal complaint was filed on January 27th, she went out to Mr. Gordon Larson's office (Los Angeles Smog Control Director). (R. 521). The criminal complaint required appearance in the Municipal Court on February 1, 1954. The attorney for the receiver left a telephone message at appellant Richman's office between 4:00 and 5:00 p.m. on Friday, January 29, 1954 that Mr. Richman was named as a defendant in a Criminal Complaint with reference to the incinerator at the Oliver Cromwell, that a hearing was to be held the following Monday at 9 a.m. (R. 407). Richman, his attorney, and the attorney for the Receiver appeared on February 1st and upon request by the attorney for Richman, criminal proceeding was continued and, finally, the City Prosecutor requested dismissal after the Receiver's attorney assured him the equipment was being installed.

H. Receiver's Fees.

The Petition of the Receiver prayed for reasonable fees. The District Courts Rule 18 (c) (4) requires a Receiver's Petition for fees to "show in what amount . . . fees will be asked for." The Court explained upon the first day's hearing

"The Court: The court should note for the record here that when the Receiver was engaged in the preparation of his report either Mr. Hallberg or Mr. Whyte—I don't recall which one—called me and said, Do we have to set forth a particular amount or may we leave it to the discretion of the court and ask for a reasonable fee?'

"I told them I would like for them to set forth in detail what had been done and if they wanted to leave it to the court to determine a reasonable amount that the court would not insist upon compliance with the rule that an amount shall (15) be prayed for. But they could leave it as reasonable or they would state a specific amount.

"I was then told that Mr. Whyte felt he ought to put in a specific amount, which he did, and that Mr. Hallberg preferred to leave his to a prayer for reasonable amount." (R. 254)

Objections to the Receiver's Petition had been made upon the ground that it did not comply with the Court rule specificially requiring a Receiver to set forth the specific amount he desired to be paid as fees. The Court inquired from the attorney for Richman what fee Richman felt should be allowed for the Receiver. (R. 256). The attorney explained (R. 258-261), the problems appellant had in determining what would be a reasonable fee and concluded:

"I would like to hear the man say what he feels he is entitled to for his weekends or his trips up here."

Thereupon the Court stated:

"We had better take full evidence on what he did." which resulted in several days trial. (R. 261).

At the end of the first day's hearing on May 12th the Court Stated:

"We will begin this case tomorrow at 11:00 o'clock. Please let's not try to make a career of it. It is the sort of thing that should have been over by now. It is the sort of thing that is customarily handled on a Monday motion calendar." (416)

Thereupon counsel for Richman inquired from the witness Roy E. Hallberg, Receiver:

"Q. How much compensation do you personally feel you should receive, Mr. Hallberg?

"A. Well, in my Petition I am leaving that entirely up to the Court."

Appellant explained his dilemma to the Court, arising out of the Receiver not stating what fees he would consider satisfactory, as required by the rules, and the attorney for the Receiver petitioning for $3,000.00 ordinary fees and extraordinary fees, without specifying the amount, whereupon the court assumed responsibility for the Receiver failing to specify the amount of fees he desired. (R. 624). After the Court had rendered its decision of October 5, 1954, awarding the Receiver $6,000.00 fees and his attorney $1,000.00, another hearing was had at the request of the Court, in its Chambers, on October 12th. (R. 843). After the Receiver's attorney explained why $1,000 was unreason-

able and that $3,000.00, plus extraordinary fees would be reasonable the Court stated concerning Mr. Hallberg's fee:

> "Now, Mr. Hallberg asked for less than he got out of the Court. I increased, not the prayer of his petition, but the tenor of his testimony, because I felt that he had not given any account to the element of having to account so fully in court, as well as by the accounting which he had prepared and filed.
>
> "He was brought before the court almost as if he were accused of a crime here and was treated by some of the parties to the suit, or by one of the parties to the suit and one of the attorneys to the action with less respect than I have seen embezzlers treated when I was handling the criminal calendar of the court." (R. 858-859).

Appellant was never informed as to what fee Receiver Hallberg desired other than he would rely upon the Court to fix a reasonable fee. Appellant established the facts in the Court, presents them to this Court in an effort to determine a proper fee, for this Receiver, who has as yet to state what amount of fee he is asking for under Rule 18(c)(4).

During the October 12, 1954, presentation by the attorney for the Receiver seeking additional attorney's fees, the Trial Judge stated concerning the Receiver's fees:

> "The Court was interested, however, that the expense of a brief court supervision of these properties, pending what was then determination of an

> appeal, or it was a promised appeal then, or the possibility of settlement, the court was interested that the court's administration of the property should not be so costly as that which the court has found was excessive. I expressed that to everyone in the case." (R. 858)

Appellant Richman's administration of the property under the Trust from November, 1945 to December 2, 1953, resulted in an increase in value from $375,000 to $1,200,000. (R. 603-604). He had been operating the assets under the name Nagel-Richman during the period 1936 to 1945. He had operated apartment buildings for banks and trust companies commencing about 1932. (R. 602-603). He contributed one-half the assets of the trust. Richman's compensation under the Trust Agreement was fixed at 10% of receipts, exclusive of capital assets. The Receiver's report showed total receipts of $94,153.59, which included $377.35 being "other" than rents receipts or rental collections in the amount of $93,776.24. (R. 105). This would have resulted in a fee to Richman of $9,377.62. (Richman's operations for the same months a year earlier resulted in receipt of $97,404.58). (R. 600). In addition to Appellant Richman's ownership of one-half the capital assets of the Trust, his time and experience in administering the Trust as agent, he paid the expenses of managing the properties out of his 10% fee.

> "I furnished the office, telephone, all equipment, all stenographic and bookkeeping help, tax work, and paid the phone bill, paid the postage."

He did not pay the phone bill for the managers at the five apartment house. They were paid by the trust. He testified:

> "Mr. Harrison was paid by me entirely. He was never an employee of the Trust, or never was any other secretary of mine an employee of the Trust. I paid the social security, unemployment, compensation insurance on my secretary."
>
> "The Court: The books and records of the Trust were kept at your expense? You paid the entire cost for their keeping?"
>
> "The Witness: I did." (R. 604)

The Receiver's accounting shows a total expenditure for salary of bookkeepers and other salary expense of $1,628.18 (R. 110, Ex. 2); Petty cash $180.48; Rental of apartment occupied by Receiver $65.00 a month would be an additional $195.00; Receiver's fee $6,000.00; his attorney $1,800.00, resulting in a total cost of $9,803.68, exclusive of miscellaneous expenses, some of which are shown in the Receiver's accounting as typewriter rental, pay roll taxes and other items. Thus $9,803.68 at least will be paid out. The court stated it should be less than the $9,377.62 Mr. Richman would have received.

Reference is here made to the facts heretofore stated, for example: the Receiver's $355.00 a month salary while employed by the County of Orange; his previous monthly salary of $350.00 a month while employed by Narmco Company, a fishing pole manufacturer; and his $100.00 a week drawing account while an

employee of Morgan Construction Company for a few months in 1951, as bearing upon this question. The entire record demonstrates that the Receiver delegated his duties to Miss Cosgrove, who in turn relied upon the five managers of the apartment houses and Mr. Richman's former secretary, the bookkeeper Harrison, to operate the properties and keep the records.

Other evidence presented by the Receiver upon the fee question was the testimony of Jefferson A. Mann (R. 298-324), who tstified he was connected with R. A. Rowan & Co., a real estate concern which had been operating for over fifty years in Los Angeles; that it managed properties for individuals (R. 298). He identified the Los Angeles Realty Board Schedule of Management Fees (R. 309), which was applicable to apartment houses (R. 310); that such manager bore his own expenses of collecting the rents and making an accounting; made recommendations to an owner concerning management, renegotiated contracts, loans, and made major decisions as to alterations. The schedule of fees provided:

> " . . . when the monthly rentals from the single tenants or the average monthly rentals from two or more tenants in the same building is over $2,-000.00, the charge shall be 3%." (R. 313).

I. Objection To Receiver's Report.

Appellant Richman's Objections to the report of the Receiver, the Accounting attached thereto, and the Petition for fees, was directed to the allegations of the Report that the Receiver had performed the many

acts alleged in the Report, when in fact he had delegated to others the performing of those acts (R. 126); the Receiver's failure to perform the Air Pollution Control, Inc., Contract pertaining to the installation of smog control units (R. 127); failure to be available or otherwise supervise the maintenance of the refrigeration unit which failed at the Western Arms Apartments (R. 128); failure of the Receiver to carry out the Order of the Court dated February 26, 1954, in that he failed to collect rents which he stated in his account to be $2,000.00; failure to retain control of the Petty Cash fund in the hands of his agents-managers in the amount of $785.00; his act of paying $2,027.25 on February 27, 1954 (R. 134-135); and his failure to pay Appellant's claim, in the amount of $3,104.33 (R. 135). During trial it was ascertained that the Receiver in no manner accounted for or reported concerning his $400.00 deposit upon Workmen's Compensation, on which $158.00 was refundable to him (R. 667) rather he turned it over to appellant Tidwell. (R. 664)

J. Attorney's Fees.

Appellant Richman's Objections to the attorney fees claim for ordinary services in the sum of $3,000.00, plus an unspecified amount for extraordinary services, were upon the ground that they were excessive, upon the further ground that the attorney unreasonably expended time, and improperly advised the Receiver. Among the latter class of acts were:

1) The attorney and Receiver taking over the Trust's bank account and requesting managers to turn

over money to them and, in fact, collecting moneys from one of the managers before the Receiver was appointed; 2) The attorney's failure to advise the Receiver that nonperformance of a Smog Control Contract might result in criminal prosecution; 3) The attorney apparently erroneously assumed that a litigant whose property has by Court Order been placed in the possession of a Receiver has no right to make inquiries concerning his property or the acts of the Receiver. After the Criminal Complaint had been filed against Richman, as an owner of one of the apartment houses and Agent for the Trust, thereafter the attorney for the Receiver had left a telephone message at Mr. Richman's office late on Friday afternoon advising that the Criminal Citation was set for hearing on Monday morning. Mr. Richman on Saturday went out to see the Receiver's bookkeeper Harrison to find out what had happened. The attorney for the Receiver objected to the statements made by the bookkeeper as being hearsay and asserted:

> "but to go behind the Receiver's back, as Mr. Richman did in this instance, to go out and talk to his agent behind his back, to spy upon his operations without his knowledge, seems to me that those statements are clearly outside the scope of the agent's authority." (R. 643).

The services rendered by the attorney are stated to be evidenced by the Petition to Employ Counsel (R. 27), and the Order thereon (R. 29); the Petitions to pay Christmas Bonuses and to Renovate (R. 33, R. 36); the hearing upon the renovation Petition held on Jan-

uary 15, 1954 (R. 216-230), the Report and Petitions for fees.

Appellant presents the question as to whether or not this voluminous record and appeal would be pending had the Receiver and his attorney complied with the Court Rules as to filing an accounting and specifying the amounts of fee they desired, in their Petitions. Services rendered in this category are shown by the record. Affidavit of the attorney, and Order of the Court extending the Receiver's time to file his first report as required by the Rules. (R. 44). Had the Receiver or his attorney made a disclosure as to the Receiver's experience, qualifications and manner in which the Receiver was administering the property—that is by delegation while he was employed by the County of Orange, this record and the issues presented would not be still pending. The Receiver and his attorney took the position they were defending themselves, when it was their duty as fiduciaries to explain their whereabouts, acts and qualifications when attempting to justify them and the fees they sought. The original award of $1,000.00 to the attorney was ample and even the $1,800.00 later total award was less than the $3,000.00 plus extraordinary the attorney sought. The court itself chastised the attorney when granting him the additional $800.00. (R. 863, 865, 867).

SPECIFICATIONS OF ERROR

Appellant Richman filed notice of appeal from the whole of the Order and Judgment dated November 19, 1954, which resulted in the following errors:

1. It was error for the Trial Court to assume it had jurisdiction to construe and enforce Richman's and Tidwell's Settlement Agreement evidenced by the written offer dated February 19, 1954, and written acceptance on February 25th, 1954, except to the extent that it direct the Receiver to account, protect the rights of any other persons not parties to this litigation, and impound the remainder of the funds subject to the directions of Tidwell and Richman, the parties to the settlement agreement. (R. 137, 138, 154, 245, 685, 686).

2. It was error for the trial court to award a credit in favor of Appellant Tidwell against the balance of the funds in the possession of or under the control of the Receiver upon the following items:
   A. One-half of asserted utility bills amounting to $938.75;
   B. One-half of certain taxes amounting to $2,476.38;
   C. One-half the cost of certain catalytic units (smog control) amounting to $1,300.00. (R. 195)

3. The Court erred in failing to surcharge the Receiver on account of rents collected after the settlement and before 5:00 p. m. February 28, 1954, in the sum of $1,290.59, in the amount of $158.00 being Workmans Compensation Insurance deposit refund, in the amount of $2,027.25 prepayment upon trust deed note, and in the

sum of $785.00, being a petty cash fund under the control of the Receiver, subject, however, to the Receiver not being personally surcharged in the event the Appellant Tidwell is surcharged with these amounts. (R. 184, 185).

4. The Court erred in failing to award Appellant Richman a credit upon the funds remaining in the possession or under the control of the Receiver for his November, 1953, fee under the Trust Agreement, in the amount of $3,104.35, but rather awarded him $1,862.60. (R. 194).

5. The Court erred in ordering that the Receiver reimburse himself from the moneys in his possession to the extent of $89.20 paid out by him for copies of depositions. (R. 195).

6. The Court erred in awarding to the Receiver Roy Hallberg a fee in the amount of $6,000.00. (R. 194).

7. The Court erred in awarding to John White, Attorney for the Receiver, a fee in the amount of $1,800.00. (R. 194).

8. The Court erred in determining that the First and Final Account and Report of the Receiver was full and correct. (R. 193, 194).

9. The Court erred in failing to disqualify the Trial Judge to hear the settlement of the Receiver's Account. (R. 157, 158, 456, 461).

ARGUMENT

Specification of Error 1.

Appellant Richman acknowledges that a court of equity has power and control over its Receiver but this power and control is for the benefit and subject to the direction of the parties to the litigation except where some public interest, as distinguished from private rights, might be involved. The Receiver and the Court exist for the benefit of the citizens—the parties litigant. The parties to litigation, after appointment of a receiver, have the right and the duty to minimize litigation and settle their differences. Having made a settlement the Court should—and we assert must—make all reasonable and proper Orders requested by the parties to carry out the settlement. Here the parties agreed as a part of their Settlement Contract that they make a Stipulation that the Receiver be relieved of his active duties at 5:00 p. m. February 28, 1954, and thence he account as of that hour. The parties submitted their Stipulation and the Court made an Order carrying it into effect, both dated February 26, 1954. The Settlement Agreement itself evidences the distrust existing between the parties and their counsel and reveals an effort to spell out principles for and a plan of carrying out the settlement. The offer, which Tidwell and her attorneys in writing accepted "unqualifiedly" (R. 143), recited the circumstances as follows:

> "As I review the matter, the court decision gave your client what she was offered two and a

half years ago before suit was filed, namely, a division of the trust. The court in the decision avoided any intimation of fraud on the part of Mr. Richman and your auditing has not produced any fraud. Therefore, until such time as the last court has sustained your contention of any fraudulent acts on the part of Mr. Richman, you may not expect any concession from Mr. Richman that in any way implicates him with fraud.

"Your intimations that any arrangement Mr. Richman might make that he would not live up to are not appreciated. Bear in mind the record in this case is full of examples of Mrs. Tidwell changing her mind after agreements have been made, and I can assure you that anything Mr. Richman agrees to will be carried out.

"In regard to your request that I spell out 'exactly' the precise terms and wording of the release, I do not think that is at all necessary. Any agreement made contemplates a full release of any and all claims that either Mr. Richman or Mrs. Tidwell have or think they have against the other from the beginning of the world to the present time. If this matter is going to be terminated, it is my desire to have it terminated completely and not by use of trick terminology which might subject it to other lawsuits in the future." (R. 139, 140).

The Court itself was aware of the family difficulties existing between Tidwell and Richman. Apparently it took upon itself the arranging for the Receiver's bond on December 2, 1953. (R. 555). Even after the parties had settled, the Receiver and his at-

torney on a Sunday evening after a golf game on March 7, 1954, called the Trial Judge and advised him that a dispute existed between Tidwell and Richman concerning payment of certain expenses. The attorney for the Receiver testified he advised the Trial Judge that the attorneys for the parties were not in agreement. The Trial Judge directed the Receiver and the attorney at that time by phone to pay the various items without consulting with or considering the desires of the parties to the settlement.

The Court was sufficiently informed by the terms of the February 26th, 1954 Stipulation (R. 54) of the parties to make its Order on February 26th terminating the Receiver's general powers by its Order directing the Receiver to terminate his active duties and to turn over the assets to Tidwell:

> "excepting money in bank and under the control of the Receiver".

That the Court realized the limited powers of the Receiver is apparent from its Order directing the filing of the dismissal of the action with prejudice, when it ordered the filing of dismissal on March 22, 1954, in the following terms:

> "It is so ordered except that jurisdiction is retained over all monies, credits and assets in possession or under control of Roy E. Hallberg, Receiver heretofore appointed herein, and over said receiver and to fix his compensation and allow his expenses, including fee for his attorney." (R. 125)

These events having occurred, Appellant Richman in his Objections to the Report and Account of the Receiver, alleged that the Trial Court had no power to interpret or construe the litigants' Settlement Agreement of February 25, 1954, and alleged that each is entitled to apply to a court of competent jurisdiction to initially and originally determine their respective rights under their settlement contract. (R. 138).

The receivership was ancillary and incidental to the action which had been dismissed with prejudice. The Court by its Order of February 26th divested the Receiver of control over the subject matter of the receivership "excepting money in bank and under the control of the receiver". These were the only assets under the control of the receiver subject to his accounting for his administration, when the Court on March 22nd ordered the dismissal with prejudice and spelled out its jurisdiction over the Receiver to fix his and his attorney's compensation.

Aside from the events which seemed unusual to Appellant Richman, such as the Trial Judge forthwith ordering the appointment of the Receiver on November 30th, and the representations made concerning the Receiver's availability, experience and qualifications and his delegating his duties to Miss Cosgrove. Appellant Richman had the right, in the event he could not agree with Tidwell as to the construction of their settlement agreement, to cause such a dispute to be the subject matter of another action. Such an action would have permitted of the due process procedure requiring pleadings to be initially presented and deter-

mined by a court of competent jurisdiction. That his objection to the Trial Judge proceeding to construe their contract was justified, is evidenced by the extended spasmodic hearings during the months of May and June resulting in the Court approving the Receiver's Report and Accounting as being correct in every instance. Obviously, such a blanket approval was error because:

A. The Court, in another part of his Order directed that a payment made by the Receiver in the amount of $2,027.27, being an installment due on March 1, 1954, was an improper payment on the part of the Receiver. (R. 193).

B. The accounting of the Receiver did not account for rents during the period February 25th-28th, which his Report recited to be the sum of $2,-000.00, but which was shown by the evidence to be $1,290.59, and which item was acknowledged in the Court's Memorandum Decision (R. 184).

C. The accounting acknowledged petty cash funds, but the Receiver failed to retain control of them and, in fact, permitted Tidwell's agents to take possession of them, as acknowledged in the Decision. (R. 185).

D. The Court in its Order recited:

> "The Receiver failed to pay certain utility bills incurred in the month of February, 1954, in the sum of $1,877.50" (No evidence to support Finding).
>
> "The Receiver also failed to pay any of the real property taxes on Trust assets for the months of January and February, 1954, which

> taxes amount to the sum of $4,952.77. The Receiver further failed to pay for two catalytic units in the sum of $1300.00 each. . . . " (R. 193).

Each of these purported Findings and the portions of the Judgment which thereafter ordered certain benefits for Tidwell constituted and was a construction of the Settlement Agreement which was beyond the power and right of this Trial Court. These points are in addition to and aside from the fact that the Court ignored the written escrow instructions signed by the settling parties and their attorneys providing there be no prorations, specifically none for rent or taxes.

Specifications of Error 2, 3 and 4.

The Trial Court's Memorandum Decision (R. 182) and its Order of October 22, 1954 (R. 189) each in part interpreted and by order applied the Settlement Agreement of the Appellants. Court ordered pretrial for June 21, 1954, Appellant Richman's Exhibits A to H were received, a continued hearing was had on September 27, 1954, the court sustained an objection to Appellant Tidwell's evidence (R. 835-837), no other trial was ever held. The gross abuse of judicial discretion charged by Richman arises out of the fact that when Appellant Tidwell offered on September 27 evidence as to her reimbursement claims for real property taxes and utility bills the court sustained an objection (R. 837) to this evidence leaving no evidence of record to support the Court's Order and Judgment directing the payment of Tidwell's claims.

The Settlement Agreement verbatim appears R. 139-144. It consists of a February 19, 1954 letter offering to buy or sell under the terms stated in the letter. One of which was that the parties would stipulate for the Receiver to be relieved as of February 28, 1954 and that the Receiver would report; and/or after payment or provision for the Receiver's claims and expenses and operating obligations, any funds remaining would be divided equally.

Appellant Tidwell contended in the trial court that the written agreement and the escrow instructions speicfically contemplated by the agreement must be construed together under California Civil Code 1642 citing *King v. Stanley,* 32 Cal. (2), 584, 197 P. 2d 321; *Pigg v. Kelley,* 92 Cal. App. 329, 268 P. 463; *Womble v. Wilbur,* 3 Cal. App. 527, 86 P. 921. For Richman the trial court was advised (R. 821) that he agreed with this proposition and cited a more recent decision. *Lester v. Handelsman,* May, 1954, 125 Cal. App. (2) 243, 270 P. 2d 563, where the court stated at 567:

> "There are two instruments involved here, the agreement of purchase, and the escrow instructions. Where the terms of an executory agreement for the sale of real property are clarified by the provisions of signed escrow instructions, those instruments are to be considered together in determining the understanding of the parties and in ascertaining their rights and obligations."

If there is uncertainty as to the meaning of the Settlement Agreement it was clarified by the escrow instructions executed on February 26 one day after Tidwell

accepted the offer by her letter of February 25 when both she and her attorneys signed the instructions, (R. 800) which specifically provided that there would be no proration of taxes. The escrow instructions contained the provision:

> "The following adjustments only are required in this escrow."

No adjustment or prorations were provided for. Specifically blank spaces were provided for the insertion of the date for prorating taxes and rents and the word "none" was inserted.

The abuse of discretion by the trial court becomes more glaring as a result of it ordering proration of taxes and utilities when Appellant Richman informed the Court at pretrial (R. 837) that in the event Tidwell's proffered evidence as to taxes and utilities expenditures were to be received in evidence it would necessitate a trial for the following reasons: Appellant Richman had paid personal property taxes which otherwise should be prorated and an accounting of the monies received by Tidwell after March 1st on account of utilities would be necessary. The trial court stated that in the event it changed its ruling it would appoint a Master to take Evidence. (R. 837).

The Order of the trial court was further erroneous in awarding the buyer Tidwell one-half the cost of the catalytic units, amounting to $1,300.00. These were contracted for before the Receiver was appointed. They were apparently installed after the hearing on the

criminal citation on February 1, 1954. The contract specifically provided (R. 802) that the balance of the purchase price was "payable" upon receipt of the Los Angeles County Polution Control District Permit to Operate." The permits were issued (R. 805) on March 9 and June 2, 1954. The purchaser Tidwell was, under the Settlement Agreement, (para. 4):

> "entitled to all receipts and shall assume all operating obligations of Richman Trust from March 1, 1954 on or until the appointment of a Receiver as might occur under 7(c) hereof."

Appellant Tidwell purchased the assets subject to the Receiver operating the assets and collecting the rents until February 28, 1954. The smog control catalytic units were being purchased after March 1, 1954 on the date when the Los Angeles County Polution Control District issued a permit (March 9 and June 2) even though they may have been physically installed before March 1, 1955.

The parties specifically provided an exact hour in their stipulation, Exhibit C, (R. 798) when the Receiver should terminate collecting the rents. It was to be 5:00 o'clock, Sunday, March 28, 1954. The Court made the Order, Exhibit D, (R. 798) carrying out the stipulation, both of which provided that the Receiver was to carry on his active duties of management and control and possession of the assets until 5:00 p.m. February 28, 1954. Thereafter, the Receiver was required to continue to retain the "money in the bank and under the control of the said Receiver." The Decision states that these rents collected before

5:00 p.m. on February 28 and the cash funds in the amount of $785.00 in the possession of the Receiver's agents, the managers of the apartments, were "assets of Richman Trust." The Court then deducts that since Tidwell purchased the assets she was entitled to these sums of money. Obviously, such a deduction ignores the terms of the Purchase Agreement, the Stipulation of the parties and the Court's own order that she was to purchase as of 5:00 p.m. February 28, 1954 and the receiver was to retain all the monies and receipts before that hour. After an accounting the purchaser was entitled to one-half the remainder. The Order of the Court fails to carry out its decision concerning a payment made by the Receiver on February 27, 1954 in the amount of $2,027.28 for the benefit of Tidwell. The Decision explains (R. 186) that the Receiver could not have anticipated on February 27 that this Trust Deed installment payment would not have been paid by him on March 1st, three days later. But the record without conflict shows the Receiver and his attorney discussed the settlement on the evening it was made on February 25 and the attorney explained the February 26th stipulation and order to the Receiver. (R. 418-419). The Court concludes that Richman is entitled to a claim upon the funds for this amount and gives him credit for half the amount, to wit, $1,013.64 in its Order. (R. 195). This would appear equitable and proper if it were not for the fact that the whole $2,027.28 should be returned to the funds, thence the fund divided and the parties' respective one-half surcharged or credited with the proper payments. The effect of the

present Order is to substantially award Tidwell practically three-fourths of this $2,027.28 payment.

The Receiver's accounting showed a deposit on account of Workmen's Compensation Insurance in the amount of $400.00. It completely failed to account for the unused portion of this item. There is no conflict in the evidence that refund of $158.00 was due and that the Receiver turned the policy and refund over to the Appellant Tidwell.

Appellant Richman's agency contract to manage the Trust, of which he was a one-half beneficiary, required a fee of 10% of receipts, exclusive of capital assets. He had received this fee during the many years he managed the properties which increased in value from $375,000 to $1,200,000. The Receiver acknowledged the claim in his accounting in the amount of $3104.33 and this amount should have been ordered paid.

Specifications of Error 5, 6 and 7.

The Court erred in awarding a fee of $6,000.00 to the Receiver, $1,800.00 to his attorney, and deposition costs in the amount of $89.20.

A late expression of the court's attitude in awarding compensation to receive is found in *In re Pittsburgh, S. & N. R. Co.,* 75 Fed. Supp. 292, where the court adopted a previously established rule:

> "There are no hard and rigid rules for determining the compensation of equity receivers. The matter rests largely in the sound discretion of the Court. See Vol. II, Section 620, Tardy's Smith

on Receivers (second edition). The same author in Section 621, cites the following from 34 Cyc. 472, which was quoted with approval by the Circuit Court of Appeals in the case of *Eames v. H. B. Clafin Co.,* 2 Circ. 231 F. 693, 695, as illustrating the controlling factors to be considered by a court of equity in fixing the compensation of equity receivers: 'The considerations that should be controlling with the court in fixing compensation are the nature of the matters administered, the amount involved, the complications attending it, the amount of bond required, the time spent, the labor and skill needed or expended, the degree of success attained under all the circumstances, the fidelity to details, the appreciation evidenced as to the responsibilities of the position, the character of such responsibilities, the expedition with which the trust has been administered, in view of results reached, and the method, character, and promptness of the accounting, having regard, as a standard, to what is paid for somewhat similar services in the performance of official duties, not the standard in private business transactions. . . . The value of the services rendered should not be considered generally but only with reference to the trust administered.' " (page 297).

Naturally, there are no reported decisions involving a Receiver's fee under the circumstances existing in this case, but a case involving fees of a hotel receiver was found in the early case of *Cake v. Mohun,* 17 S. Ct. 100, 164 U. S. 341, 41 L. Ed. 447. At 450 then the Court stated:

"In view of the fact that the receiver had never been in the hotel business; that he employed a manager at $125.00, and a part of the time at $150.00 a month, and required of him a bond for the faithful performance of his duties; that he was not prevented from giving his usual attention to his business, and ordinarily spent only his evenings at the hotel,—we are bound to say that, if it had been an original question, we should have fixed his compensation at a considerably less amount."

A Receiver's prior earnings are relevant in determining his fees.

Walton N. Moore Dry Goods Co. v. Lieurance, 38 Fed. 2d 186, at 192.

His prior experience and knowledge is in detail pointed out in *In Re Insull Utility Investments,* 6 F. Supp. 653, 661; that is, there the Court pointed out as an example.

"If the appointee be an engineer or an operator, whose years of experience especially qualify him and he has technical training supplementing such experience, and he gives all of his time to the task, he should be paid more than one who, though entitled to the confidence of the court, is not equally qualified to render the service for which the technical experience of the engineer qualifies him. Nor should one award the same compensation to an outsider who does not devote all of his time to the management and operation of the company."

Concerning time expended by the Receiver the Court further stated at page 661:

> "Another important factor in the compensation of the receiver is the time devoted to the work and the character of the work performed. Does such appointment exclude the appointee from carrying on other work? Is the appointee thus named, a receiver in other suits? Are the appointees engaged in business, and does the appointment terminate such participation?"

That compensation should be moderate is the rule.

> " . . . as said in *Penner v. Drilling Development Co.* (D.C.) 293 F. 766, 767, 'it must be remembered, though too often forgotten, that receiverships are not to enrich the encumbents and counsel.' "

Bailie v. Rossell, 60 Fed. 2d 806, 807.

In re New York Investors, Inc., 79 Fed. 2d 182, where an Appellate Court pointed out when reducing the Trial Court's allowance by fifty per cent:

> "The Supreme Court has given notice on more than one occasion that receivers and attorneys engaged in the administration of estates in the courts of the United States and in litigations affecting property within the jurisdiction of those courts should be awarded only moderate compensation, and that many of the allowances heretofore awarded have been too high." (Page 185).

Finally, the maxim, he who comes into equity must come with clean hands, has application to any conveivable situation. Here the Receiver's hands are at least unclean concerning the representations to the Trial Judge; his concealing his being employed at the Coun-

ty of Orange and his delegating his receivership in fact, to Miss Cosgrove. As explained in *Johnson v. Yellow Cab Transit Co.,* 321 U. S. 383, 387, 88 L. Ed. 841, 818, the doctrine is not to punish a litigant but is for the advancement of right and justice. It is not right or just to compensate this Receiver at the rate of $2,000.00 a month or $6,000.00 for services rendered by his wife and for his weekend trips from Orange County to Los Angeles, when he concealed he was for all but one week of the three months a full time employee rendering forty hours services of each week to the County of Orange at a salary of $355.00 a month.

The Trial Court's Order and Judgment of October 22, 1954, authorized the Receiver to pay the cost of his copies of his and his attorney's depositions. Indirectly, because not specifically identified, there is involved the failure of the Receiver to retain control of the item of $785.00, being petty cash in the possession of his five managers, and the further item of $1,290.59, being rents collected by the managers before 5:00 p.m. February 28, 1954, which the Receiver failed to obtain from the managers and which admittedly was obtained by the purchaser, Appellant Tidwell. Also the balance of the Compensation Insurance Deposit.

The Trial Judge apparently appreciated that the Receiver was subject to being surcharged when it stated concerning a contemplated audit on April 12, 1954, at the time it set the accounting of the Receiver for trial on May 12th, and determined to hold a pretrial upon the issue of distribution of the remainder of the moneys, when he said:

> "If it turns out the receiver is either a miserable bookkeeper and these records are in bad shape, or he is a man of no fidelity and has served in that capacity here, or with that taint, then the expense of the audit will be assessed against the receiver."

Appellant Richman seeks an application of the rule referred to by the Trial Judge which is in substance that the receiver is a trustee. The Supreme Court in *Crites, Inc., v. Prudential Ins. Co.* (1944), 322 U. S. 408, 88 L. Ed. 1356, when reversing a Trial Court in allowing a Receiver certain fees which he and the attorneys agreed to pool and split upon the ground that the allowance was a clear abuse of discretion, pointed out (414-1360):

> "It is obvious, moreover, that Simkins (the receiver) was bound to perform his delegated duties with the high degree of care demanded of a trustee or other similar fiduciary."

At 418-1362:

> "But whether the parties to such a contract should be allowed any fees at all, and if so the amount thereof, are normally matters within the sound discretion of the District Court and are not reviewable except where a clear abuse of discretion is apparent. In this case, however, the fact that Simkins entered into a fee-splitting contract so patently illegal, plus the fact that he engaged in other misconduct and indiscretions incompatible with his position as an officer of the court, compel the conclusion that all fees and compensation as co-receiver should have been denied him. Cf.

Woods v. City Nat. Bank & T. Co., supra (312 U. S. 268, 85 L. ed. 825, 61 S. Ct. 493, Am. Bankr. Rep. (NS) 655."

In the instant case the Receiver boldly refused to advise Appellant of the sum of money he would accept for his part-time services as Receiver while employed as a full-time employee of the County of Orange. The Receiver's attorney demanded $3,000.00 for ordinary services; he demanded that an additional amount be fixed by the Court for extraordinary services. Naturally, Appellant Richman availed himself of deposition proceedings between April 12 and May 12, 1954 to confirm the results of what was obviously an expensive investigation to find out what qualifications, experience and abilities the Receiver Hallberg actually possessed. The Receiver and his attorney requested the Clerk of this Ninth Court to print substantial portions of their deposition. Their depositions demonstrate the quality of the services rendered by the attorney and the, at least equivocations, of the Receiver and his wife, Miss Cosgrove, when the Receiver was being questioned concerning these subjects.

For example only, (R. 331), is an instance where the Receiver, upon being prompted by his Miss Cosgrove, attempted to avoid disclosing his full-time employment by the County of Orange.

Under these circumstances the Receiver should at least bear his own expense of his own copies of depositions and should be surcharged with the petty cash item of $785.00, the rents in the amount of $1,290.59, and compensation insurance, conditioned upon waiver

of the surcharge in the event Appellant Tidwell accounts to Appellant Richman upon these items. Proper deduction in the amount of the $6,000.00 fee awarded by the Trial Court will avoid surcharging the Receiver with the expenses incurred by the Appellant in the Trial Court and upon this appeal. In like manner the award of $1800.00 to the Receiver's attorney is excessive, considering the nature and extent of his services as shown throughout the record.

Specification of Error 8—Accounting.

Appellant Richman seeks an Order reversing the Trial Court's approval of the Receiver's Report and Accounting as being full and correct. He asserts that it was and should have been easy to have conditionally surcharged the Receiver's Account and directed the payment of the surcharge out of Tidwell's one-half of the remainder in the following manner:

1. Amount Reported by the Receiver as being under his control and possessions:		$20,697.71
Add the following items, being amounts received by Tidwell:		
Petty Cash	$ 785.000	
Rents Feb. 25-28—5:00 p.m.	1,290.59	
Note Payment	2,027.25	
Comp. Ins. Refund	158.00	

Total Additions or Surcharge:			4,260.84
Total Funds Chargeable to the Receiver:			$24,958.55
2. Direct the Receiver to pay to Appellant Richman the 10% Trust Agreement Fee for his services during November, 1953 in the amount of:			3,104.33
Balance Remaining:			$21,854.22
½ the Balance of the Fund			$10,927.11
3. Richman and Tidwell each being entitled to ½ the fund, subject to Tidwell surcharge and Richman the above credit, as follows:			
A. *Tidwell:*			
½ the Fund:		$10,927.11	
Petty Cash	$ 785.00		
Rents	1,290.59		
Note Inst.	2,027.25		
Comp. Ins. Refund	158.00	4,260.84	
Receiver pay to Tidwell:		$ 6,666.27	
B. *Richman:*			
½ the Fund:		$10,927.11	
Fee		3,104.22	
Receiver pay to Richman:		$14,031.44	

Balancing of the Accounting:		
Receiver's Report:		$20,697.71
To Tidwell:	$ 6,666.27	
To Richman:	14,031.44	$20,697.71

4. Such fees as this Court deems appropriate and proper to be paid to the Receiver and to his attorney for their services in this transaction should be paid one-half by Richman and one-half by Tidwell, out of the $14,031.44 payable to Richman and the $6,666.27 payable to Tidwell.

As between Appellants Richman and Tidwell a further problem is presented. Appellant Tidwell, at the time of filing this Brief, has asked for and obtained a Stipulation from Appellant Richman that she need not file an Opening Brief. Appellant Tidwell may abandon her point (R. 973) that she is appealing from the Order of the Trial Court in failing to award her $577.50 for revenue stamps and escrow expenses, being the only point not heretofore covered in this Brief, and if she does she will not be an Appellant of record and will not have been, in fact, one of two persons jointly interested in the protection of a fund. It would appear frivolous for Appellant Tidwell to assert a right to be repaid the seller Richman's escrow and revenue stamp expenses when she and her attorneys signed the seller's escrow instructions which provide (799 A):

> "Notwithstanding the printed provisions in these instructions I agree to pay, in addition to the buyer's costs and expenses in this escrow, all of the seller's costs and expenses of this escrow and

the costs of the policy of title insurance, revenue stamps and recording and filing of instruments and documents and the seller's escrow fee."

In reversing the Trial Court's Order of October 22, 1954, the well established, fundamental rule that where one of two persons who are the owners of a common fund expend moneys to pay the court costs and expenses of attorneys to protect the fund, should be reimbursed for these costs and expenses. Such a direction by this Honorable Court would do justice between the Appellants Tidwell and Richman.

Specification of Error 9—Trial Judge Disqualification.

Appellant Richman urges consideration of the entire record in determining whether or not there was a gross abuse of judicial discretion arising out of the Trial Judge refusing, upon Petition, to disqualify himself under the circumstances existing. The Statute provides:

"Sec. 455. Interest of justice or judge. Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

28 U.S.C.A. 455.

There are few, if any, reported decisions applicable to the circumstances of this case. The procedure for a litigant to raise the question requiring the Trial Judge

to "in his opinion" decide whether he should disqualify himself is by a Petition to disqualify.

> *Cyc. Fed. Proc.,* 2nd Ed., Vol. 1, p. 32, Paras. 22 and 23.

It was only after thorough investigation, consultation and deliberation that the appellant Richman, a member of the Bar, approved the filing of the Petition to disqualify on April 30, 1954. (R. 158-164). The Court had on April 12, 1954 (R. 157) made a statement

> "that no evidence will be taken concerning the appointment of the Receiver in this action."

Investigation had been in process for several weeks concerning the Receiver Hallberg's whereabouts and background, culminating in his admissions in the deposition proceedings on April 22nd. (R. 329-333, R. 871-921). With all due respect to the judiciary and its members, it was then believed and set forth in the Petition to disqualify that Judge Tolin was a material and relevant witness to the unclean hands and misconduct of the Receiver, especially the Receiver's representations as to his ability, experience and qualifications.

Appellant Richman and his counsel believe they have a duty to stand up for their cause against the charges of their nominal adversaries Appellant Tidwell, the Receiver and his Attorney, and even the Judge of the Court. The record will reveal upon close scrutiny no discourtesy to any Member of the Bar, any party to the proceeding or the Trial Judge. Under the circumstances the Trial Judge should have disqualified

himself and certainly was not justified in castigating litigant Richman or his Attorney with the assertion that the Receiver had been treated worse than a criminal. In *Walton N. Moore Dry Goods Co. v. Lieurance,* C. C. A. 9th, 1930, 38 F. 2d 186, it was held that the salary of a receiver prior to his appointment is of substantial persuasive value in determining his fees. This Receiver's salary of $350.00 a month while employmented by Narmco in 1953, drawing account of $100.00 a week in 1951 with Morgan Construction and $355.00 at County of Orange for a 40-hour work week when he was acting as Receiver was proper evidence. They were entitled to know whether the Receiver was available, as he represented, to take over five apartment houses containing in excess of 400 units which the parties and owners agreed for settlement purposes had a value of $1,200,000. They were entitled to question the Receiver concerning his representations as to acting for or as a Receiver in Chicago or managing apartment properties for elderly, wealthy relatives.

Dated August ....., 1955.

Respectfully submitted,

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JOSEPH T. ENRIGHT,
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By JOSEPH T. ENRIGHT